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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 366

KNICKERBOCKER PRINTING CORPORATION,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of the Case	3
Status of the Trade Fixtures in the Proceedings Below	3
Knickerbocker's Ownership of the Trade Fixtures	7
Reasons for Granting the Writ	9
Conclusion	14
Appendix	15

Cases Cited

Clarke v. Clarke, 178 U. S. 186	11
H. Abraham & Son v. Casey, 179 U. S. 210	11
Jackson v. New York, 213 N. Y. 34 (1914)	11
Kimball Laundry Co. v. United States, 338 U. S. 1 (1949)	11
Matter of City of New York (Allen St.), 256 N. Y. 236, 240-3 (1931)	11, 13
Matter of City of New York (Whitlock Ave.), 278 N. Y. 276 (1938)	12, 13
Matter of Mayor of City of New York, 168 N. Y. 254	14
Poillon v. Gerry, 179 N. Y. 14	14
United States v. Becktold Co., 129 F. (2d) 473, 477	13
United States v. Certain Parcels of Land, 102 F. Supp. 854, 858 (S. D. N. Y. Feb. 8, 1952)	4
United States v. General Motors Corp., 323 U. S. 373, 383-4 (1945)	10
United States v. 19.86 Acres of Land in East St. Louis, 141 F. (2d) 344, 346	13
United States v. Petty Motors Co., 327 U. S. 372 (1946)	11
United States ex rel. T. V. A. v. Powelson, 319 U. S. 266, 279 (1943)	11

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Knickerbocker Printing Corporation prays that writ of certiorari issue to review the judgment entered in the above entitled condemnation proceeding by the United States Circuit Court of Appeals for the Second Circuit sustaining the judgment entered by the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (I. 192-200) is reported at 102 F. Supp. 854. The *per curiam* opinion of the United States Court of Appeals for the Second Circuit affirming (II. 53-4)* is reported at 212 F. (2d) 894.

* References to I. followed by a number are to pages in volume I, references to II. are to pages in volume II, of the certified transcript of record.

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1954 (II. 55). A petition for rehearing filed by petitioner (II. 57-66) was denied by order of the Court of Appeals on June 7, 1954 (II. 67). On September 1, 1954, petitioner applied to this Court for additional time in which to bring on a writ of certiorari. The time was extended to September 25 by order of Mr. Justice Jackson on September 3, 1954. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1254 (1).

Question Presented

A constitutional question is presented on this appeal as to the right of the tenant of real property to be compensated for its trade fixtures taken with the realty when the Government condemned for public purposes, in view of the direction in the Fifth Amendment that no private property shall be taken for public use without just compensation. Here the Government took in condemnation trade fixtures worth, according to testimony, in excess of $150,000 and has paid nobody anything for them. A subsidiary question also arises as to whether the tenant's constitutional right is affected by the fact that it did not install the fixtures but took them over from its predecessor in interest. A further issue is whether the Federal courts are obliged to respect local state law determining the character of fixtures as realty and the nature of rights therein as affected by lease provisions.

Statute Involved

The condemnation provisions under which the United States proceeded here appear in 40 U. S. C. § 258 permitting the United States to proceed to condemn property

by filing a "declaration of taking * * * to acquire the lands described in the petition * * * for the use of the United States". This includes a "description of the lands taken" and a "statement of the estate or interest" therein condemned, as well as a "statement of the sum of money estimated * * * to be just compensation for the lands taken". Title passes to the United States on filing the declaration and depositing the sum so estimated into court. This is, however, subject to the fact that "the right to just compensation * * * shall vest in the persons entitled thereto" and "shall be ascertained and awarded in the proceeding". The ultimate award may exceed the amount deposited, in which event "the court shall enter judgment against the United States for the amount of the deficiency".* Such result would in any event be indicated by the Fifth Amendment to the Constitution forbidding the taking of private property for public use without "due process of law" or without "just compensation".

Statement of the Case

Status of the Trade Fixtures in the Proceedings Below

Knickerbocker Printing Corporation here seeks review of the decision, order and judgment of the Court of Appeals for the Second Circuit (II. 53-5) affirming *per curiam* an order of the District Court (I. 208-9) confirming the Supplementary Report of Commissioners of Appraisal (I. 205-7) which failed to make any award or to fix any compensation for its trade fixtures taken when the Government by declaration of taking (I. 12-16) and judgment thereon (I. 16-20) condemned the premises 425-435 East 24th Street, New York City (described as Damage Parcel 8) for the erection of a Veterans' Hospital.

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* The statute has not been set out in full because it is thought that the issue is really constitutional rather than one of statutory construction.

The District Court had previously, after referring the matter to Commissioners for determination of damage values, confirmed (I. 201-4) the Report of its Commissioners of Appraisal (I. 179-191) fixing the sum of $750,000 as the unit award for the taking of the fee title, out of which the sum of $175,000 was directed to be paid to Knickerbocker for the value of its long-term leasehold on the premises used by it for the manufacture of books. The Commissioners in their first Report assumed the effect of the lease provisions was to vest the ownership of the trade fixtures in the owners in fee as landlords (I. 186 ff.). However, in view of the landlords' specific denial of any right, title or interest in the trade fixtures, they made no award at all for the fixtures (I. 183). These fixtures not only included bins, shelving, ventilators, cases, partitions, lighting fixtures, power wiring, panels and motor fittings (see Appendix) but also included what the Court of Appeals described as "the foundations and irremovable connections" for the machines (II. 53).

With the Commissioners' interpretation of the lease and with the result thus reached, Judge Knox refused to agree, pointing out that it conferred upon the Government "an inequitable and most unjust deodand", that is, a *windfall.* Judge Knox returned this phase of the condemnation to the Commissioners with the instruction that "• • • The Commissioners should determine the value of these fixtures. The amount is to be added to the unit award for Damage Parcel 8 and given to the tenant". *United States* v. *Certain Parcels of Land*, 102 F. Supp. 854, 858 (S. D. N. Y. Feb. 8, 1952).

In their Supplementary Report, the Commissioners of Appraisal nevertheless arrived at the identical result and again omitted to provide any compensation for the trade fixtures, contrary to the court's instructions. This time they said that the order of the court below remitting the matter limited them to an evaluation only of those trade

fixtures which the tenant had itself "installed" (I. 206), thereby eliminating completely from consideration all those trade fixtures owned by Knickerbocker but which had been installed by Knickerbocker's predecessor, J. J. Little & Ives Company (I. 207).* Judge Knox confirmed the Supplementary Report (I. 208-9). Thus, by an exercise in semantics revolving about the word "installed", the Government was finally permitted to retain the "inequitable and most unjust deodand" which on first consideration had seemed so shocking to the court below.

By judgment (I. 16-20) on the declaration of taking (I. 12-16), the District Court on November 30, 1948 vested in the United States the fee simple absolute title to the realty in question, "together with the improvements thereon and appurtenances thereto belonging" (I. 19-20). Petitioner filed a bill of particulars (I. 27-9) and subsequently an amended bill (I. 30-3) scheduling its trade fixtures, machinery and equipment included in the taking (Sched. C., I. 31-3). The fee owners from the first conceded petitioner's right to compensation for the fixtures, and their stipulation to dispose of their appeal with prejudice was approved by order of the District Court on July 8, 1953 (I. 5). Knickerbocker, the tenant, petitioner here, took an appeal from the District Court's failure to require compensation to be paid for the fixtures (I. 209-11). This appeal the Second Circuit rejected on May 14, 1954 (II. 53-4), stating that "thus defendant to succeed here must show error in Judge Knox's ruling that it was entitled to an award only for such trade fixtures as it installed during its term of rental"; and holding that under the lease "any claim in the premises is that of the

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* The rationale is made clear by the statement of the Commissioners that "none of the * * * 'trade fixtures' were installed by it (petitioner) either during its brief fee ownership or during its occupancy * * * as tenant". That leaves, as the remaining possibility, acquisition from petitioner's predecessor, which had made the installations (I. 207).

owners which has finally been settled on the abandonment of their appeal", and that the tenant therefore should recover nothing for the trade fixtures. The inference is inescapable that the Court of Appeals thought the right to compensation for the fixtures resided in the landlords. However, the District Court had already held to the contrary (102 F. Supp. 854, 858). The United States took no appeal at any time.

Accordingly, the only remaining question is the right of Knickerbocker, as tenant, to have compensation for its trade fixtures, respecting which the fee owners have disclaimed any right or interest. The fixtures in question consist of built-in racks, bins, shelving, cases, partitions and panels, etc. with a value as set in the amended bill of particulars of $90,310 (I. 31-2) and machine and motor connections, fittings and installations with a claimed value of $77,841 (I. 33). These values were confirmed by expert testimony (I. 57-9; 89-91; 94-5; 104-13; 132-42; 145) and by exhibits in evidence.* See Appendix. Upon the trial, this claim for fixture items totalling $168,151 in the amended bill was voluntarily reduced to $152,751 (I. 105-113). See Appendix. The Report of the Commissioners of Appraisal clearly states that "in respect to Damage Parcel 8, the value of said parcel has been fixed and determined without regard to any fixtures annexed by the tenant" and the value fixed for that parcel "does not reflect any value for annexations which the tenant claims to have made" (I. 153). And the Supplemental Report continued the omission, notwithstanding the District Court's contrary direction, on the theory that the fixtures in question were not installed by petitioner but by its predecessor in interest (I. 207).

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* Schedule C of the amended bill listing the fixtures was supported by testimony and exhibits in evidence. I. 31-2 is in evidence as Tenant's Ex. J, pg. 7A; I. 33 is Tenant's Ex. 5, Scheds. 1 and 2. These have been reprinted, insofar as material, as an Appendix to this petition, for convenient reference.

It thus becomes important in considering the pertinent facts to look to the history of rights in the fixtures and the instruments by which they came to petitioner.

Knickerbocker's Ownership of the Trade Fixtures

Petitioner Knickerbocker was the direct successor of J. J. Little & Ives Co. which had been engaged in the printing business in New York City since 1867. On December 24, 1945, the executors of Arthur W. Little, deceased, issued an invitation for offers for all of the issued and outstanding preferred and common stock of J. J. Little & Ives Co. which he held. On January 4, 1946, the bid of Harold Drimmer and Newton Glekel at the price of $1,294,825 having been approved by the Surrogate's Court, New York County, Knickerbocker Printing Corporation, the corporation organized by Drimmer and Glekel for that purpose, acquired all of the stock (I. 142).

Thereafter on February 20, 1946, pursuant to a plan of liquidation duly adopted at a special meeting of the stockholders and directors, J. J. Little & Ives Co. was dissolved and its assets, by way of liquidating dividend, were distributed in kind to petitioner Knickerbocker as sole stockholder (I. 142, 144, 146-7).

The distribution of the real estate, consisting of the land and building at 425-435 East 24th Street, was evidenced by deed from J. J. Little & Ives Co. to Knickerbocker Printing Corporation, dated February 21, 1946 and recorded in the office of the Register of the City of New York, County of New York, on February 25, 1946 (I. 145, 166 ff.). The distribution of all of the other assets of J. J. Little & Ives Co., including trade fixtures, machinery and equipment, was evidenced by an Instrument of Transfer and Assignment to Kickerbocker, dated February 21, 1946, which set over to the latter corporation (I. 175-6)

"* * * All of the assets (except cash) on the Transferor of every kind and description, including, without limiting the generality of the foregoing, all * * * machinery * * * fixtures, equipment * * * of every kind, nature and description * * * (etc.) * * *

To have and to hold said assets to the said Transferee, its successors and assigns, to its and their own use forever * * *."

A similar and clearly confirmatory instrument, in practically identical form, dated June 26, 1946 was also executed and delivered (I. 146, 148, 177).

In April 1946, petitioner Knickerbocker, determining to separate the ownership of the real estate from the operation of the book manufacturing and printing business, conveyed to 435 East 24th Street Corporation, its wholly-owned subsidiary, the real estate (land and building) at 425-435 East 24th Street. The deed dated April 24, 1946, recorded in the office of the Register of New York County on May 9, 1946 (I. 147-8, 170 ff.) is strictly a conveyance of the real estate. As a result, Knickerbocker remained in sole ownership of the book printing business and retained to itself all of the other assets which had been distributed to it on the liquidation of J. J. Little & Ives Co.; and it continued to operate the business at the same premises pursuant to a simultaneous lease which it received from 435 East 24th Street Corporation for a 21-year term beginning May 1, 1946. This is the lease, dated May 8, 1946 (I. 25, 149) for which an award was made to petitioner in this proceeding and carved out of the fee award (I. 184-5). This lease reserved to Knickerbocker, as tenant, the right at any time to remove its machinery and trade fixtures, including, of course, the machinery and fixtures which had come to it through the liquidation of J. J. Little & Ives Co. (I. 25, see par. 38).

On November 11, 1946, 435 East 24th Street Corporation made a contract to sell the premises 425-435 East 24th Street to the ultimate fee owners from whom the United States condemned (I. 150, ff.). There ensued on November 16, 1946, a transefer only of the fee simple legal title of the premises (I. 161). All of the personal property of Knickerbocker, including its machinery and trade fixtures, remained petitioner's and it continued thereafter to use it in the operation of the book printing business. Thus, at the time of the taking by the Government on November 30, 1948, the fee title to the land and building was in the transferee fee owners, but subject to petitioner's 21-year lease; and petitioner had not only a substantial interest as a result of its leasehold in the award to be made the owners, but also had a claim in addition thereto for the taking of its trade fixtures and machinery, with which it had continuously operated its business, and of which it was the legal owner upon the date of the taking.

Reasons for Granting the Writ

1. This case presents an important constitutional issue which has not before been passed on by this Court. As the Court of Appeals for the Second Circuit observed, there had been placed in the condemned building "costly and expensive heavy machines with special installation such as wiring connections and the foundations" for the machine beds (II. 53). Although the tenant, petitioner here, had removed "such of these as were removable before delivery of possession to the Government", in the words of the court below, there still remained "the foundations and irremovable connections". There still remained also such traditional trade fixtures as the built-in racks, bins, shelving, cases, partitions and panels specified in the expert appraisers' report (Appendix).

The Court of Appeals has held that the tenant is "entitled to an award only for such fixtures as it installed during its term of rental" (II. 54). While this Court has never ruled on this question, we submit that the Fifth Amendment to the Constitution requires the United States to pay "just compensation" whenever it takes the property of its citizens, regardless of the manner in which the property was acquired and, in the case of fixtures, regardless of whether they were installed by the petitioner or came to it lawfully from a predecessor in interest who made the installation. Whatever was there on the date of the taking should, we submit, be paid for.

It has been settled since *United States* v. *General Motors Corp.*, 323 U. S. 373, 383-4 (1945) that the condemning authority is required to compensate not only for the land and building but also for trade fixtures and permanent equipment and installations incorporated in the premises on the date of taking. And the character of such installations as real property for purposes of condemnation is controlled by local law and unaffected by any agreement between the fee owner and the tenant as to whether, in their private relationship, the fixtures are to be considered realty or personalty. Such was this Court's holding in the *General Motors* case:

> "For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected. And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking. This is true whether the fixtures and equipment would be considered such as between vendor and vendee, or as a tenant's trade

fixtures. In respect of them, the tenant whose occupancy is taken is entitled to compensation for destruction, damage or depreciation in value. And since they are property distinct from the right of occupancy such compensation should be awarded not as part of but in addition to the value of the occupancy as such" (323 U. S. at pp. 383-4).

See also *Kimball Laundry Co.* v. *United States*, 338 U. S. 1 (1949); *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946).

It may be seriously doubted that the Court of Appeals has properly applied these prior decisions of this Court in construing the requirements of the Fifth Amendment. The result below is, therefore, not only in conflict with the Constitution, but inconsistent with the indication of the prior Supreme Court decisions in the condemnation field.

2. The result below is inconsistent also with prior decisions of this Court holding that questions of real estate rights and interests must always be determined according to local state law. See *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 279 (1943); *H. Abraham & Son* v. *Casey*, 179 U. S. 210; *Clarke* v. *Clarke*, 178 U. S. 186; *U. S.* v. *Petty Motor Co.*, 327 U. S. 372, 380-1 (1946). There is no question that under the authority of the governing local law, as laid down by the New York Court of Appeals, trade fixtures of the type here involved are real property embraced within the taking for which compensation is required and this was recognized by the District Court (102 F. Supp. at p. 858) citing the New York Court of Appeals in *Jackson* v. *New York*, 213 N. Y. 34 (1914) (Cardozo, J.); *Matter of City of New York (Allen*

St.), 256 N. Y. 236, 240-3 (1931) (Lehman, J.); see also *Matter of City of New York* (*Whitlock Ave.*), 278 N. Y. 276 (1938).

As Judge Lehman observed in the *Allen St.* condemnation, regardless of the agreement between landlord and tenant, "the tenant retains the right to compensation for his interest in any annexations to the real property which, but for the fact that the real property has been taken, he would have had the right to remove at the end of the lease". The condemnation clause of the lease here similarly left the petitioner tenant free to remove its trade fixtures on termination (I. 25, par. 38). Under controlling state law, therefore, they were the *tenant's* property and the Federal Court of Appeals was not free to rest its decision on the landlords' "abandonment" of its appeal (cf. II. 54). In so doing, the Second Circuit ignored the paramount effect of the New York Court of Appeals decision in the *Allen St.* condemnation, as well as the above cited decisions of this Court.

3. As the District Court at first recognized, the result here perpetuates an "inequitable and most unjust deodand" (102 F. Supp. at p. 858). It gives to the Government a windfall of upwards of $150,000. It deprives petitioner of trade fixtures appraised at that value which the Government appropriated when it took the realty to which they were irremovably annexed and for which it has paid not one single cent. Such an unfair windfall should not find favor with this Court. Certainly it is not in the public interest to permit the Government to perpetuate this unjust result. On the contrary, the public interest requires that petitioner's constitutional right be upheld by review and reversal of the decision below.

Th question involved is of great importance, both to private citizens such as petitioner, whose trade fixtures have been seized here without just compensation, indeed

wholly without *any* compensation, and to the United States, which has an interest in delineation of its obligations arising upon condemnation of industrial properties, particularly as affecting the rights of landlords and tenants under long-term leaseholds.

4. Review of the judgment below is necessary not only because of the importance of the issue involved but also because, in our view, the decision below is incorrect and inconsistent with the result reached by other Courts of Appeals.

Both the Eighth Circuit in *United States* v. *Becktold Co.*, 129 F. (2d) 473, 477 and the Seventh Circuit in *United States* v. *19.86 Acres of Land in East St. Louis*, 141 F. (2d) 344, 346, have held that:

> "Whether or not these fixtures and machinery under the facts disclosed constitute a part of the realty was dependent upon * * * the *lex loci rei sitae*. This was a question of real estate law which must always be determined by the law of the state in which the realty is located."

But the law of New York is determined squarely by the decisions of the Court of Appeals in *Matter of City of New York* (*Allen St.*, 256 N. Y. 236, 242-3 (1931)—later cited with approval in *Matter of City of New York* (*Whitlock Ave.*), 278 N. Y. 276 (1938)—where (as here) the tenant's lease contained a clause providing for termination of the term upon condemnation by public authority. As Judge Lehman stated the law of New York:

> "In this case, the clause of the lease which provided for its termination upon the vesting of title to the land in the city evidences an agreement between landlord and tenant that the tenant shall receive out of the award no compensation for his leasehold interest.

> Even so, the tenant retains the right to compensation for his interest in any annexations to the real property which but for the fact that the real property has been taken, he would have had the right to remove at the end of his lease. (*Matter of Mayor of City of New York,* 168 N. Y. 254; *Poillon* v. *Gerry,* 179 N. Y. 14.)"

The Court of Appeals for the Second Circuit here has held the ruling below was "clearly right under the terms of (the) lease, which in Article 13 provided for termination of the lease on condemnation", etc. and "hence any claim in the premises is that of the owners" (II. 54). The Second Circuit has thus chosen to reject the law of New York—the *lex loci rei sitae*—and to impose some concept of its own instead. This was not only constitutionally unsound as applied to the facts here; it created a manifest diversity with the rule as laid down by the Seventh and Eighth Circuits and a conflict which requires resolution.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for writ of certiorari should be granted.

Respectfully submitted,

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HARRY RODWIN,
JAMES L. GOLDWATER,
Counsel.

APPENDIX

Trade Fixtures and Installations*

Item	Field Cost	Deprec.
1. Miscellaneous:		
Pipe Rocks	$ 142	$ 28
Wall Racks	40	8
Pipe Enclosures	210	42
Wheel Guards at Cols.	8,800	1,760
Spray Booth & Exhaust	200	40
Bins & Shelving in Vault	10,000	2,000
Pump Foundations ..	300	60
" " ..	400	80
" " ..	150	30
Linoleum	2,220	444
Elec. Light Fixtures.	8,340	2,502
Auto Call System ...	1,050	315
Shelving	861	172
Drip Pans	4,532	1,133
Venetian Blinds	400	80
M & G Window Ventilators	91	18
Glass Window Ventilators	72	15
Misc. Shelving	110	22
Supply Room Counter	250	50

* This schedule was originally Schedule C annexed to the amended bill of particulars (I. 31-3). Part 1 of Schedule C is in evidence as Tenant's Ex. J, p. 7A; Part 2 is Tenant's Ex. S in evidence, schedules 1 and 2.

TRADE FIXTURES AND INSTALLATIONS (Cont'd)

Item	*Field Cost*	*Deprec.*	
Supply Room Shelving	1,570	314	
Built-in Locker	73	15	
Built-in Supply Cabinets	675	135	
Built-in Supply Cabinets	450	90	
Book Cases	1,228	246	
Bins in Stock Room	2,800	560	
Process Piping, Incl. Valves	13,012	2,602	
Process Ventilation	5,825	1,165	
Misc. Partitions	9,318	1,864	
Elect. Power Wiring	12,898	3,224	
Elect. Power Panels	9,755	2,439	
Field Cost	$95,772	$21,453	
General Conditions	4,789		
Builder's Profit	6,034	4,617	
Architect's Fee	6,395		
Int. & Taxes	3,390		
Cost of Reprod.	$116,380	$26,070	
Depreciation	26,070		
Sound Value			$90,310.00

Note: Sum of all O. H. is 21.518%

Appendix

TRADE FIXTURES AND INSTALLATIONS (Cont'd)

(I. Miscellaneous Brought Forward ..... $90,310.00)

2. Machine & Motor Connections, Fittings, Installations:

Item		
Machine Units:		
Freight	$ 5,595.96	
Cartage Handling	3,908.04	
Installation	37,403.23	
Motors, Starting Equipment:		
Installation Motors	947.97	
Installation Starting	1,887.54	
Machine Connections:		
Motor Wiring	5,216.60	
Machine Guards	853.35	
Millwright Work	2,115.55	
Machine Foundations	251.25	
Machine Floor Pans	1,367.35	
Miscellaneous	2,874.30	
D. C. Equipment:		
Rheostats	2,329.35	
Switches	7,851.93	
D. C. Installation Value:		
Motors	2,223.18	
Rheostats	544.05	
Switches	2,472.08	$ 77,841.73
Total		$168,151.73*

* Part 2 of this Appendix, in evidence as Tenant's Ex. S, schedules 1 and 2, was corrected to eliminate duplications, thus reducing the subtotal from $77,841.73 to $62,441.29 and the total accordingly to $152,751.44, by Tenant's Ex. T in evidence (see I.105-113).

INDEX

Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	5
Conclusion	7

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 366

KNICKERBOCKER PRINTING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 102 F. Supp. 854 (R. I. 192-200), and that of the Court of Appeals at 212 F. 2d 894 (R. II 53-55).

JURISDICTION

The judgment of the Court of Appeals was entered May 14, 1954 (R. II 56). A petition for rehearing was denied June 7, 1954 (R. II 69). By order of Mr. Justice Jackson dated September 3, 1954, the time for filing a petition was extended to September 25. The petition for certiorari was filed

September 24, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a condemnation proceeding by the United States, a tenant which had previously owned the property taken was entitled to compensation for annexations to the building made in connection with the installation of machinery prior to the commencement of its tenancy.

STATEMENT

Certain land in New York City, improved by a building used as a printing establishment, was acquired by petitioner in February, 1946 (R. I 141, 166-169). In April, 1946, petitioner conveyed the land, building and improvements to a separate corporation (R. I 170-173) which later sold the property to the owners who held title at the time of the taking here involved (R. I 161-163). In May, 1946, the petitioner became the tenant of the property under a 21-year lease (R. I 25). Paragraph 13 of this lease provided:

> If the whole or any part of demised premises shall be taken or condemned by any competent authority for any public or *quasi* public use or purpose, then, and in that event, the term of this lease shall cease and terminate from the date when the possession of the part so taken shall be required for such use or purpose, and without apportionment of the award. *Rider 4* [typewritten addition to printed lease] In the

event of such proceeding, the landlord shall give written notice of such proceeding to the Tenant and shall permit the Tenant to be joined as a party to such proceeding. The Tenant shall be entitled to receive such part of any condemnation award as may reflect the Tenant's costs and expense from moving from the premises, the value of the lease and/or the value of any improvements made by the tenant to the extent that same were not amortized over the balance of the term of the lease. The current rental, however, shall in any such case be apportioned.

Paragraph 38 provided:

38. [typewritten] Tenant shall have the right, at any time, and without the permission of the landlord, to remove from the demised premises any or all of Tenant's machinery, trade fixtures, and/or personal property, regardless of the manner in which such machinery, trade fixtures, or personal property may have been affixed to the realty, provided, that tenant shall, at its own cost and expense, repair any and all damage or injury to the demised premises occasioned thereby, so that the premises after such removal shall be in as good condition (reasonable wear and tear excepted) as before the removal of said machinery, trade fixtures, or personal property.

In connection with the printing business, certain fixtures such as racks, shelves and bins, and certain

machine and motor connections are alleged to have been annexed to the building (R. I 31-33). A finding was made that none of these so-called "trade fixtures" were installed by the petitioner (R. I 206-207).

On November 29, 1948, the United States filed a declaration of taking of the property (R. I 12-20). Commissioners appointed by the court found that $750,000 constituted just compensation "for the taking of the absolute fee simple title to the said premises, including all improvements thereon * * *." (R. I 182.) Of this sum they awarded $175,000 to petitioner for loss of its leasehold interest (R. I 184). But, the commissioners added, they had disallowed petitioner's claim for fixtures allegedly installed by it since the tenant had no title thereto under the terms of its lease (R. I 186-190). Since the landlord had "disavowed" any claim on that account, the award of $750,000 did "not reflect any value for annexations which the tenant claims to have made." (R. I 183.)

However, the district court took the view that provisions of the lease reserved to petitioner its interest in trade fixtures which it had attached to the property (R. I 199). It added: "Whatever may have been the landlord's right, if any, to make claim for the value of these fixtures, the fact that it failed to do so should not inure to the benefit of the United States. Any such result would be an inequitable and most unjust deodand." (R. I 199) Accordingly, the court directed the commissioners to hold further hearings in order to determine "the

just compensation and value, if any, of trade fixtures which may have been installed by" petitioner and to increase the award to petitioner by that amount (R. I 204). To meet the argument that this order limited the evidence to fixtures installed by petitioner, excluding additions made by the prior owner when it occupied the building, petitioner moved the District Court to resettle the order to include all trade fixtures by whomsoever annexed (R. II 1). This the District Court refused to do (R. II 20).

The commissioners held a hearing and reported that petitioner "did not install any trade fixtures in the building." (R. I 207) The district court confirmed the report (R. I 208-209) and the court of appeals affirmed its judgment (R. II 53-55).

ARGUMENT

Petitioner seeks to raise a constitutional issue, that property was taken from it without compensation (Pet. 2). But the issue actually is not whether petitioner is entitled to compensation for any property taken from it, but whether it had any property right in the fixtures for which it was claiming compensation.

The District Court in effect found that petitioner's only right was under the lease to such annexations as had been made by it (R. II 199, 204). Previous improvements would have passed from the petitioner at the time of transfer of the land and building (R. I 170-172). The terms of the lease, which would constitute the tenant's only claim

to fixtures, referred only to improvements made by the tenant (R. I 25).

Petitioner contests the decision, claiming in effect that the owner of the building never acquired title to the earlier annexations but that these continued to be held by petitioner (Pet. 7-9). The construction of the documents involved adopted by the District Court and affirmed by the Court of Appeals appears to be right, but in any event the issue is not one of general importance which should be reviewed by this Court. Nor is there any failure to follow the New York real property law cited by petitioner (Pet. 13) which requires compensation to a tenant on a taking of real estate only to the extent that under the lease he has a claim in the annexations.

The petitioner argues that the United States has acquired property without paying anyone just compensation for it. The Commissioners who recommended the award of $750,000 state that the value of all annexations except those made by the tenant, of which it later found there were none, was included in their award (R. II 44, 46-47, 49). But even assuming the contrary, petitioner has no complaint unless it can establish a legal interest in the improvements, which issue was decided against it by both the District Court and the Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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